APPEAL NO. 032689
FILED NOVEMBER 19, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 8, 2003. The hearing officer determined that appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second, third, or fourth quarters. Claimant appealed these determinations on sufficiency grounds. Respondent (carrier) responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm in part and reverse and remand in part.

Claimant appeals the adverse determinations contending that she made an effort to return to work. We construe claimant's appeal as appealing the adverse good faith determinations regarding all three quarters.

Claimant contends that the hearing officer erred in determining that she is not entitled to SIBs for the second quarter. The qualifying period for the second quarter ran from August 22 through November 20, 2002. The record reflects that claimant did not work or look for work during the qualifying period for the second quarter. The hearing officer could find from the evidence that claimant did not provide a narrative report from a doctor that specifically explains how the injury caused a total inability to work and that she did not make a weekly job search. We also note that a December 26, 2002, functional capacity evaluation (FCE) indicated that claimant could work. We have reviewed the complained-of determinations and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations regarding the second quarter are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Claimant contends that the hearing officer erred in determining that she is not entitled to SIBs for the third quarter. There was evidence that claimant was enrolled in a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission (TRC) during the qualifying period for the third quarter. The qualifying period for the third quarter ran from November 21, 2002, through February 19, 2003. In evidence was an Individualized Plan for Employment (IPE) signed on January 22, 2003. The IPE lists an employment goal, steps to achieve the goal, a description of the services to be provided or arranged, the start and end dates of the described services, and claimant's responsibilities for the successful completion of the plan. The IPE states that "job placement services" were purchased from the service provider, "[Company O]." A letter from Ms. G from Company O dated February 25, 2003, states that: (1) claimant is active with Company O; (2) claimant keeps in contact with Ms. G "at least three times

a week for possible employment"; (3) Ms. G provides a list of possible employers to claimant; and (4) claimant informs Ms. G when she has submitted applications and then Ms. G follows up with the employers. Claimant testified that she began looking for work in January 2003 and that she found a job on March 5, 2003, and did not look for work after that point. She said she began to work on March 25, 2003. Claimant's Application for [SIBs] (TWCC-52) for the third quarter lists job searches with four employers from January 22 through February 25, 2003. It appears that claimant also made 20 job searches during January 2003 before she actually signed the IPE. One of the employers listed on claimant's TWCC-52 for the third quarter was "[Company P]." Claimant said Company P was the one that found a job for her.

Claimant signed the IPE on January 22, 2003, and there was evidence that by February 25, 2003, she had been working with Company O. Ms. G indicated that claimant had been keeping in contact at least three times per week. The IPE also required claimant to keep in contact with Vocational Rehabilitation Services "at" 60 days. Claimant was already employed and met the employment goal listed on the IPE by the 60th day after she signed the IPE. Therefore, there was evidence that claimant was participating in a "program, provided by the [TRC] . . . for the provision of vocational rehabilitation services designed to assist the injured employee to return to work that include[d] a vocational rehabilitation plan." We are unable to tell whether the hearing officer considered whether claimant satisfactorily participated in such a TRC program, however. The hearing officer said claimant "contacted" the TRC, but did not otherwise discuss the IPE or claimant's actions in this regard during the qualifying period. We must remand for the hearing officer to make findings regarding whether claimant was enrolled in a program provided by the TRC for the provision of vocational rehabilitation services designed to assist the her to return to work. The hearing officer should also make findings regarding whether claimant satisfactorily participated in the TRC program. If the hearing officer finds that claimant was not acting in good faith regarding TRC participation, she should explain her reasoning. In this regard, we would note that if claimant was satisfactorily participating in such a TRC program during any portion of the qualifying period, then she has satisfied Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(2) (Rule 130.102(d)(2)). *See* Texas Workers' Compensation Commission Appeal No. 030930, decided June 6, 2003. We reverse the hearing officer's determinations regarding good faith and SIBs entitlement for the third quarter and remand for further proceedings consistent with this decision.

Claimant contends that the hearing officer erred in determining that she is not entitled to SIBs for the fourth quarter. The fourth quarter qualifying period was from February 20 through May 21, 2003. Claimant testified that she returned to work during the qualifying period for the fourth quarter. She said she worked 39 hours per week between March 25 and May 5, 2003. She said the doctor "suspended" some of her working hours in May because she told him the pressure on her knees was "too much." She said she worked 15 hours per week for the remainder of the qualifying period. Claimant did not completely fill out the TWCC-52, for the fourth quarter. She said she was confused because the TWCC-52 was not in Spanish. However, claimant did attach

her paycheck stubs showing her dates of employment and the amounts she earned during the qualifying period.

Regarding claimant's ability to work, a December 26, 2002, FCE stated that claimant demonstrated the ability to perform work at the light level. In an April 25, 2003, report, Dr. J said claimant's knee has worsened in the past year, that she had mild effusion and pain with motion, and that claimant reported pain and swelling when she stands for a long time. He said claimant's light-duty restrictions are permanent. In a June 18, 2003, report, Dr. J said claimant is probably going to need knee replacement surgery in the future. In a July 8, 2003, letter, Dr. J stated that claimant is unable to perform full duty and that she is not able to work more than 15 hours per week. In an August 11, 2003, report written about three months after the fourth quarter qualifying period ended, Dr. A said, "I am rather surprised to see that she is now able to work. There is degeneration in her knee, but she tells me she is working at least 15 to 20 hours per week . . . ." Dr. A also said, "I would have to agree with the doctor, she is probably a candidate for a knee replacement."

At the hearing, carrier implied that because claimant was not working full-time during the entire qualifying period, she was not in good faith. However, that is not an accurate statement of the law. The Appeals Panel has held that if a claimant complies with Rule 130.102(d)(1) and has returned to work in a position that is relatively equal to the injured employee's ability to work during *any portion* of the qualifying period, that will satisfy the good faith requirement. Texas Workers' Compensation Commission Appeal No. 030298, decided March 10, 2003. If the hearing officer finds that claimant worked relatively equal to her ability to work during the six weeks when claimant testified that she worked 39 hours per week, then the hearing officer can find that claimant has satisfied the rule. We note that the focus of the "relatively equal" inquiry is not on whether the wages are the same. Rather, what is critical is evidence that supports the determination that the employment was relatively equal in terms of hours worked and whether the claimant is working within the restrictions. Texas Workers' Compensation Commission Appeal No. 000702, decided May 22, 2000; Texas Workers' Compensation Commission Appeal No. 000608, decided May 10, 2000.

In this case, the hearing officer appears to have imposed a job search requirement and determined that claimant was not in good faith during the fourth quarter qualifying period because she did not look for work every week. However, as stated above, if claimant returned to work relatively equal to her ability to work during any portion of the qualifying period, the claimant does not then have to establish that she also searched for work during the period of time during the qualifying period when she was not working relatively equal to her ability to work.

We must remand for the hearing officer to reconsider the issue of good faith and SIBs entitlement with regard to the fourth quarter. The hearing officer should make findings regarding how many hours per week claimant was able to work during the qualifying period, whether claimant was working within her restrictions, and whether she

had returned to work in a position that is relatively equal to her ability to work during any portion of the qualifying period for the fourth quarter.

We affirm that part of the hearing officer's decision and order that determined that claimant is not entitled to SIBs for the second quarter. We reverse the hearing officer's determinations regarding good faith and SIBs entitlement for the third and fourth quarters and remand for further proceedings consistent with this decision. The hearing officer should permit the parties to present argument in this regard.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

According to information provided by carrier, the true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

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Judy L. S. Barnes
Appeals Judge

CONCUR:

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Chris Cowan
Appeals Judge

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Thomas A. Knapp
Appeals Judge